93-706

No.

In the Supreme Court of the United States

OCTOBER TERM, 1993

OREGON WASTE SYSTEMS, INC., AND GILLIAM COUNTY, OREGON,
PETITIONERS

v.

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON AND ENVIRONMENTAL QUALITY COMMISSION OF THE STATE OF OREGON,
RESPONDENTS

Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the fact that a state fee is calculated by reference to the costs assertedly incurred by the State in regulating the taxpayer is sufficient—standing alone—to immunize the fee against Commerce Clause scrutiny, even when, as in this case, the fee taxes only interstate commerce and fails the test for discriminatory state exactions set forth in *Chemical Waste Management, Inc.* v. *Hunt*, 112 S. Ct. 2009 (1992).

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

In addition to the parties listed in the caption, Columbia Resource Co., L.P., was a petitioner in the Supreme Court of the State of Oregon and is a respondent in this Court.

Pursuant to Rule 29.1 of the Rules of this Court, petitioner Oregon Waste Systems, Inc., states that its parent corporation is Waste Management, Inc., and that Waste Management, Inc.'s parent corporation is WMX Technologies, Inc. Oregon Waste Systems has no subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Oregon Waste Systems, Inc., and Gilliam County, Oregon, respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Oregon in this case.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Oregon (App., *infra*, 1a-19a) is reported at 316 Or. 99 and 849 P.2d 500. The opinion of the Oregon Court of Appeals (App., *infra*, 20a-44a) is reported at 114 Or. App. 369 and 837 P.2d 965.

JURISDICTION

The judgment of the Supreme Court of the State of Oregon (App., *infra*, 45a-46a) was entered on June 9, 1993. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Sections 459.297 and 459.298 of the Oregon Revised Statutes (1991) and the pertinent parts of Oregon Administrative Rules 340-97-110 and 340-97-120 (formerly 340-61-115 and 340-61-120, respectively) are reprinted at pages 47a-49a of the appendix to this petition.

STATEMENT

In *Chemical Waste Management, Inc.* v. *Hunt*, 112 S. Ct. 2009 (1992), this Court held invalid under the Commerce Clause an Alabama statute that taxed the disposal of waste generated outside the State but did not tax the disposal of Alabama-generated waste. The law at issue here is indistinguishable from the discriminatory measure declared unconstitutional in that case. Oregon has levied a tax that discriminates expressly—and solely—on the basis of state of origin: disposal of interstate waste is taxed while disposal of Oregon-generated waste is not.

Amazingly, the Oregon Supreme Court held the Oregon tax lawful under the Commerce Clause. The state court concluded that the measure did not have to satisfy the Commerce Clause standard generally applicable to discriminatory taxes and regulations because the tax is calculated by reference to the costs to the State from disposal of the waste. That ruling

squarely conflicts with a recent decision by the United States Court of Appeals for the Seventh Circuit holding unconstitutional a virtually identical tax provision. This Court should grant the petition for a writ of certiorari in order to resolve the conflict and correct the erroneous interpretation of the Commerce Clause adopted by the court below.

A. Background

Disposal of solid waste—a category of waste that generally includes all refuse that is not hazardous[1]—is regulated both by the federal government and by the States. Federal law fixes certain minimum standards for disposal facilities (see, *e.g.*, 42 U.S.C. §§ 6944 & 6945) and requires the preparation of state waste management plans (*id.* §§ 6942, 6943 & 6947), but leaves to the States the supervision of solid waste disposal.

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[1] Under Oregon law,

> "[s]olid waste" means all putrescible and nonputrescible wastes, including but not limited to garbage, rubbish, refuse, ashes, waste paper and cardboard; sewage sludge, septic tank and cesspool pumpings or other sludge; commercial, industrial, demolition and construction wastes; discarded or abandoned vehicles or parts thereof; discarded home and industrial appliances; manure, vegetable or animal solid and semisolid wastes, dead animals, infectious waste * * * and other wastes; but the term does not include:
>
> (a) Hazardous wastes as defined in ORS 466.005.
>
> (b) Materials used for fertilizer or for other productive purposes or which are salvageable as such materials are used on land in agricultural operations and the growing or harvesting of crops and the raising of animals.

Or. Rev. Stat. § 459.005(27) (1991). See also 42 U.S.C. § 6903(27) (substantially similar definition).

Oregon comprehensively regulates the disposal of solid waste within the State. For example, a state permit is required in order to operate a solid waste disposal site (Or. Rev. Stat. § 459.205 (1991)); the site must be operated in accordance with the governing laws and regulations and the terms specified in the permit (*ibid.*; *id.* § 459.376); the types of materials that may be disposed of at such a facility are limited by state law (*id.* § 459.247); and when disposal operations are concluded at a site, the owner must close the site and maintain it in accordance with specified standards (*id.* §§ 459.268 & 459.270). These statutory provisions are supplemented by a large body of regulations. See Or. Admin. R. Chapter 340, Divisions 93-97.

Oregon levies a number of different fees in connection with its regulation of solid waste disposal. These include:

—a permit application fee that "shall be based on the anticipated cost of filing and investigating the application, of issuing or denying the requested permit and of an inspection program to determine compliance or noncompliance with the permit" (Or. Rev. Stat. § 459.235(2) (1991)), which ranges from $100 to $10,000 for solid waste disposal (Or. Admin. R. 340-97-120(2));

—an annual fee, for the purpose of implementing the permit compliance program and other statutory requirements, to be "based on the amount of solid waste received at the disposal site in the previous calendar year" (Or. Rev. Stat. § 459.235(3) (1991)), which is fixed at $.21 per ton for landfills (Or. Admin. R. 340-97-120(3));

—an annual fee for the purpose of financing recycling programs, set at $.09 per ton (Or. Admin. R. 340-97-120(4)); and

—an annual fee, to be used for removal or remediation of hazardous substances at certain solid waste disposal sites, "based on the estimated tonnage or the actual tonnage, if known, received at the site and any other similar or related factors the [Environmental Quality Commission] finds appropriate" (Or. Rev. Stat. § 459.236 (1991)), which is set at $.13 per ton (Or. Admin. R. 340-97-120(5)(d)).

The county in which a disposal site is located also may impose a fee, the proceeds of which may be used for a variety of purposes, including mitigation of any adverse effects on the environment. The amount of the fee may be agreed upon between the county and the site operator; in the absence of an agreement, the statute provides for a formula based upon the number of tons of waste disposed of at the site. Or. Rev. Stat. § 459.310 (1991).

This case involves an additional fee on waste disposal levied by the Oregon Legislature in 1989. That provision, which is entitled "[s]urcharge on solid waste generated out-of-state," is expressly limited to "person[s] who dispose[] of solid waste generated out-of-state." Or. Rev. Stat. § 459.297 (1991). A companion provision directs the Environmental Quality Commission to fix the amount of the fee by regulation on the basis of "the costs to the State of Oregon and its political subdivisions of disposing of solid waste generated out-of-state" other than costs recovered under various other Oregon laws. *Id.* § 459.298.[2] This fee is "in addition to any other fee

[2] The costs "may include but need not be limited to costs incurred for:

(1) Solid waste management;

charged for disposal of solid waste at the site." *Id.* § 459.297. No Oregon statute requires that an equivalent fee be levied on waste generated within the State.

Following the enactment of the statute, the Environmental Quality Commission instituted an administrative proceeding to fix the amount of the fee on disposal of out-of-state waste. It established $2.25 per ton as the additional fee for waste generated out-of-state. Or. Admin. R. 340-97-120(7) (formerly 340-61-120(6)).[3]

At the same time that it enacted the additional fee on disposal of out-of-state waste, the Oregon Legislature levied an additional fee on disposal of solid waste generated within the State to raise revenues to support environmental protection programs, solid waste planning, and recycling. See 1989 Or. Laws 833, §§ 152 & 153. The fee on Oregon waste, however, was capped at $.50 per ton (later increased to $.85 per ton). Or. Rev. Stat. §§ 459A.110(5) & 459A.-115 (1991). The latter amount is 36% of the additional $2.25 per ton imposed on disposal of non-Oregon waste.[4]

(2) Issuing new and renewal permits for solid waste disposal sites;

(3) Environmental monitoring;

(4) Ground water monitoring; and

(5) Site closure and post-closure activities."

Or. Rev. Stat. § 459.298 (1991).

[3] The Commission initially adopted a fee of $2.75 per ton, but that regulation was disapproved by the state Emergency Board. See Or. Rev. Stat. § 459.298 (1991) (requiring Emergency Board approval during the interim between sessions of the rule promulgated by the Commission).

B. The Decisions Below

Petitioner Oregon Waste Systems, Inc. ("OWS"), owns and operates a solid waste landfill southwest of the City of Arlington in Gilliam County, Oregon. Both solid waste generated within Oregon and solid waste generated outside the State are disposed of at this landfill. Petitioner Gilliam County receives direct and indirect benefits from the operation of the landfill, both in terms of employment of county residents and the payment to the county of local fees and taxes.

Following the Environmental Quality Commission's issuance of the rule fixing the disposal fee at $2.25 per ton, petitioners sought judicial review of the rule in the Oregon Court of Appeals. See Or. Rev. Stat. § 183.400 (1991) (providing for judicial review of administrative rules). Petitioners challenged the rule under state law and also on the ground that the rule violated the Commerce Clause of the United States Constitution.

[4] Apparently concerned that the invalidation by the courts of the $2.25 per ton fee would create a situation in which only Oregon waste was subject to an additional levy, the Oregon Legislature in 1991 amended the statute to subject out-of-state waste to the same $.85 per ton charge as Oregon waste. See Or. Rev. Stat. § 459A.110(6) (1991) (as amended by 1991 Or. Laws 385, § 13a). (This fee was added to the $2.25 fee, which was left in place by the Legislature.) If the $2.25 per ton fee ultimately is upheld by the courts, however, the $.85 per ton fee would again be limited to Oregon waste. 1991 Or. Laws 385, §§ 91 & 92. Thus, the ultimate result would be the same as under the original 1989 law—the surcharge for Oregon waste would be $.85 per ton, while the surcharge for out-of-state waste would be $2.25 per ton.

The state court of appeals rejected the constitutional challenge. App., *infra*, 43a-44a. The court characterized the Oregon exaction as a "compensatory fee" (*id.* at 39a) because it is "based on and applied to the provision of a narrow range of state services that are directly connected to the activity on which the fees are imposed." *Id.* at 41a n.19. Cautioning that cases addressing Commerce Clause challenges to "discriminatory health and general welfare laws and general revenue measures" did not provide the controlling standard (*id.* at 40a n.19), the court stated that such a fee is invalid under the Commerce Clause only if it "is excessive for the purpose for which it is collected" or if " 'there is no sufficient relation between the measure employed and the extent or manner of use' of the state provided service." *Id.* at 40a (citation omitted). The court concluded that petitioners had failed to establish that the fee on disposal of out-of-state waste was either excessive or unrelated to the state provided services. *Id.* at 44a.[5]

The state supreme court affirmed. App., *infra*, 1a-19a. It stated that "[b]ecause of the express nexus to actual costs incurred, * * * [the fee on out-of-state waste] does not, on its face, constitute discrimination against an article of commerce, the origin

[5] The court observed that the statute governing the judicial review proceeding provided that the reviewing court could examine only the rule under review, the statutory provisions authorizing the rule, and certain rulemaking documents. App., *infra*, 44a (quoting Or. Rev. Stat. § 183.400(3)). The court stated that "[a] facial review of the enabling legislation and the rules does not show that the fees are either excessive or unrelated to the state provided service." *Id.* at 44a.

of which is outside the state." *Id.* at 17a. The court further stated that the fee "constitutes a 'compensatory' fee for specific costs incurred by the state in the regulation of [out-of-state] waste. A law imposing a compensatory fee for costs incurred by a state in supervising and regulating the activities of an entity engaged in interstate commerce is *prima facie* reasonable." *Id.* at 18a (citations omitted). The sole inquiry under the Commerce Clause, the court said, is whether the amount of the fee is " 'manifestly disproportionate to the services rendered.' " *Ibid.* (quoting *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583, 599 (1939)).

REASONS FOR GRANTING THE PETITION

The Oregon Supreme Court's decision upholding the facially discriminatory tax on waste generated outside Oregon rests on an interpretation of the Commerce Clause that has been rejected repeatedly by this Court—the view that state user fees may be upheld even if they discriminate against interstate commerce. Moreover, the decision below squarely conflicts with a recent decision of the United States Court of Appeals for the Seventh Circuit, which held invalid under the Commerce Clause a virtually identical Indiana tax statute precisely because the statute discriminated on its face against interstate commerce.

The Oregon court's decision, if not corrected by this Court, threatens to create confusion not simply in the important area of taxes on interstate commerce in waste, but more generally with respect to the proper standards for evaluating the constitutionality of the numerous state exactions that are

denominated as user fees. The petition for a writ of certiorari should be granted.[6]

A. The Oregon Supreme Court's Decision Squarely Conflicts With A Recent Seventh Circuit Decision Invalidating A Virtually Identical Statute.

The Oregon court's decision is starkly inconsistent with another lower court decision in which a virtually identical statute was invalidated on Commerce Clause grounds. Review is warranted to resolve this conflict among the lower courts.

The Indiana statute at issue in *Government Suppliers Consolidating Services, Inc.* v. *Bayh*, 975 F.2d 1267 (7th Cir. 1992), cert. denied, 113 S. Ct. 977 (1993), directed the state solid waste management board to adopt a rule imposing a fee on the disposal within Indiana of solid waste "generated outside Indiana" in an amount "necessary to offset the costs incurred by the state or a county, municipality, or township that can be attributed to the importation of the solid waste into Indiana and the presence of

[6] The question presented in this case is not related to the Commerce Clause issue presented in *Northwest Airlines, Inc.* v. *Kent County*, No. 92-97, cert. granted, 61 U.S.L.W. 3818 (U.S. June 7, 1993). The focus of that case is whether Congress has by statute eliminated the Commerce Clause limits on state authority to impose airport rents and fees. The particular Commerce Clause claim in *Northwest Airlines* involves whether a state scheme—neutral on its face—discriminates against interstate commerce. In the present case, by contrast, there is no claim of congressional authorization. And there is no dispute about the existence of discrimination: the Oregon law at issue here expressly singles out interstate commerce for discriminatory treatment. Accordingly, there is no reason for the Court to hold the certiorari petition in this case pending its decision in *Northwest Airlines*.

the solid waste in Indiana." Ind. Code § 13-9.5-5-1(b), *reprinted in* 975 F.2d at 1271-1272 n.4. The close resemblance to the Oregon statute challenged here is striking: both laws mandated a fee on disposal of interstate waste to be based on the costs of that disposal to the States, and neither statute imposed a parallel requirement on intrastate waste.

The Seventh Circuit held the Indiana statute unconstitutional on its face. 975 F.2d at 1283-1284. The State contended that the statute was justified because it " 'requires out-of-state haulers to shoulder their fair share of in-state administrative costs.' " *Id.* at 1283 (citation omitted). The Seventh Circuit stated that "[t]he problem with Indiana's argument is that it would allow a state to tax interstate commerce more heavily than in-state commerce anytime the entities involved in interstate commerce happened to use facilities supported by general state tax funds. We find no support in the caselaw for such a result." *Id.* at 1284. Relying on this Court's decisions prohibiting taxes that discriminate against interstate commerce (*ibid.*), the Seventh Circuit held the statute unconstitutional under the Commerce Clause.

Thus, essentially the same statute has been upheld against Commerce Clause challenge by a state supreme court and struck down under the Commerce Clause by a federal court of appeals because the two courts applied different legal standards in evaluating the measure's constitutionality. Oregon's courts have permitted the State to impose the very tax that a federal court has barred the State of Indiana from levying. Businesses that send waste into Indiana are free from a burden that Oregon has been permitted to impose upon those who transport waste into that

State. This Court should grant review to eliminate these disparities.

B. This Court's Decisions Establish Beyond Any Doubt That User Fees That Discriminate Against Interstate Commerce Violate The Commerce Clause.

The Oregon Supreme Court's decision is at war with this Court's Commerce Clause jurisprudence. Its reasoning would allow a State to impose highway tolls on out-of-state vehicles while exempting in-state vehicles, inspection fees on out-of-state produce while exempting in-state produce, and license charges on out-of-state businesses while exempting in-state businesses. That decision should not be permitted to stand.

1. This Court repeatedly has affirmed that "'a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State.' Once a state tax is found to discriminate against out-of-state commerce, it is typically struck down without further inquiry." *Chemical Waste Management, Inc.* v. *Hunt*, 112 S. Ct. 2009, 2014 (1992) (citation omitted). This principle has been applied most often to state regulations and state taxes designed to raise revenues for general purposes. But this Court's decisions leave no doubt that the same rule applies to all types of state financial exactions, including user fees charged by the State for the use of state-provided facilities or services.[7]

[7] The Court has described "user fees" or "user taxes" as those exactions "designed and defended as a specific charge imposed by the State for the use of state-owned or state-provided transportation or other facilities and services." *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 621 (1981).

In *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.*, 405 U.S. 707 (1972), the Court considered a Commerce Clause challenge to a $1 per person "use and service charge" for passengers enplaning from the Evansville airport; the fee was designed to recover the costs to the Authority of constructing and maintaining the airport (405 U.S. at 709). The Court held that "so long as the [user fee] is based on some fair approximation of use or privilege for use [of governmental resources] * * * and is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred, it will pass constitutional muster." *Id.* at 716-717.

The Court in that case first inquired whether the fee "discriminate[d] against interstate commerce and travel." *Id.* at 717. Observing that "both interstate and intrastate flights are subject to the same charges," and that there was "no showing of any inherent difference between these two classes of flights, such that the application of the same fee to both would amount to discrimination against one or the other," the Court held the fee nondiscriminatory. *Ibid.*[8]

More recently, in *American Trucking Ass'ns, Inc.* v. *Scheiner*, 483 U.S. 266 (1987), the Court reaffirmed that user fees are valid under the Commerce Clause only if they are *both* nondiscriminatory *and* represent a fair approximation of the use of the govern-

[8] The Court then went on to apply the other parts of the test, examining whether the charge "reflect[s] a fair, if imperfect, approximation of the use of facilities for whose benefit they are imposed" (405 U.S. at 717) and whether the charge was "excessive in relation to costs incurred by the taxing authorities" (*id.* at 719).

ment facilities or services. 483 U.S. at 289-290. Pennsylvania argued in that case that the marker fee and axle tax there at issue could be upheld as constitutionally-permissible user fees. The Court squarely rejected that argument on the ground that the fees "discriminate[d] against out-of-state vehicles." *Id.* at 290. Cf. *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, 261-262 (1974) (government may not require nonresident indigent individuals to bear costs of hospitalization while providing free services to residents); *Toomer* v. *Witsell*, 334 U.S. 385, 402-403 (1948) (Privileges and Immunities Clause prohibits State from charging discriminatory license fee to nonresidents).

Under this Court's cases, therefore, the threshold inquiry in evaluating the constitutionality of the Oregon fee is whether the exaction discriminates against interstate commerce. Because the fee "discriminates both on its face and in practical effect [against interstate commerce], the burden falls on the State 'to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.'" *Chemical Waste Management*, 112 S. Ct. at 2014 (quoting *Hunt* v. *Washington Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977)).

The Oregon Supreme Court did not undertake that inquiry. Observing that a user fee's "express nexus to actual costs incurred" provides a "discernible basis" for the fee separate from the out-of-state origin of the waste (App., *infra*, 17a), the court concluded that a State is free to "impos[e] a compensatory fee for costs incurred * * * in supervising and

regulating the activities of an entity engaged in interstate commerce" while exempting entities engaged in intrastate commerce from paying the cost of precisely the same supervisory and regulatory activities. *Id.* at 18a. In the Oregon court's view, all that need be considered to assess the validity of a user fee under the Commerce Clause is whether the amount of the fee is "'manifestly disproportionate to the services rendered.'" *Ibid.* (quoting *Clark* v. *Paul Gray, Inc.*, 306 U.S. at 599).

But the fact that a user fee may serve a legitimate public purpose—cost recovery—falls far short of establishing that discriminatory user fees will always satisfy the stringent Commerce Clause standard prescribed by this Court in *Chemical Waste Management*. See 112 S. Ct. at 2013 (listing cases in which "'a presumably legitimate goal was sought to be achieved by the illegitimate means'" of imposing a discriminatory burden on interstate commerce). The State not only must demonstrate a legitimate purpose but also must establish that the purpose could not be achieved by a less discriminatory means. In virtually every case there will be other, nondiscriminatory means by which the State may recover its costs, such as an across-the-board fee on both intrastate and interstate commerce.

What Oregon has done is to reduce the two-part user fee standard applied by this Court in *Evansville-Vanderburgh Airport* and *Scheiner* to a one-part test. A fee that is based on the costs incurred by the State will always pass muster under the Commerce Clause regardless of the extent of the discriminatory burden imposed upon interstate commerce or the availability to the State of nondiscriminatory alternatives.

There simply is no support in this Court's decisions for the startling proposition that undergirds the decision below—that once a court determines that the state levy at issue is a user fee, the anti-discrimination element of the Commerce Clause is no longer in issue. As we have discussed, far from holding that a user fee should not be scrutinized to determine whether it discriminates against interstate commerce, this Court's decisions expressly recognize that such fees must be examined on an individual basis to determine whether they comport with the anti-discrimination obligation imposed by the Commerce Clause. The Oregon court's approach would eliminate that inquiry in every user fee case.[9]

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[9] Indeed, none of the cases relied upon by the Oregon Supreme Court hold that a user fee may pass muster under the Commerce Clause even if it discriminates against interstate commerce. The statute at issue in *Clark* v. *Paul Gray, Inc.*, *supra*, required individuals to obtain a license, and pay a license fee, in order to transport motor vehicles for the purpose of offering them for sale. The statute exempted some, but not all, intrastate transportation from the license requirement. The Court considered and rejected the claim that the statute discriminated against interstate commerce, holding that the taxpayer lacked standing to challenge one of the exemptions (306 U.S. at 596) and that the other exemption involved transportation that differed in character—and therefore in the burden imposed on state resources—from the transportation that was subject to the fee (*id.* at 596-598). By evaluating the claim of unjustified discrimination on the merits, and rejecting it only because the statutory classification was justified by a factor other than the in-state destination of the exempt traffic, *Clark* makes clear that user fees may be upheld only if they are *non*discriminatory.

In *Great Northern Ry.* v. *Washington*, 300 U.S. 154 (1937), there was no claim of discrimination. The statute in question levied an identical fee on all public utilities, those engaged in intrastate commerce and those engaged in interstate commerce; the Court held that the State failed to carry its burden of showing that the fees did not exceed what was reasonably necessary to cover the cost of its regulatory and supervisory activities (300 U.S. at 168). See also *Ingels* v. *Morf*, 300 U.S. 290 (1937) (fee struck down on ground it lacked reasonable relation to costs of regulation; Court did not reach discrimination claim). Finally, *Commonwealth Edison Co.* v. *Montana*, *supra*, involved a general revenue tax, not a user fee, and the Court expressly "put to one side" its decisions addressing user fees. 453 U.S. at 621. Moreover, the Court upheld the tax in that case because it did *not* discriminate against interstate commerce.

Moreover, the Oregon court did not explain why user fees—unlike every other form of governmental charge and regulation—should be exempt from the fundamental anti-discrimination principle embodied in the Commerce Clause. The policies underlying the Commerce Clause apply with equal force in this context. Discriminatory user fees can create the same barriers against interstate trade as other types of discriminatory measures, and can fuel the very sort of commercial rivalries among the States that the Commerce Clause was designed to prevent. Any type of state enactment that expressly discriminates against interstate commerce—be it a regulation, tax, or user fee—must satisfy the *Chemical Waste Management* standard in order to pass muster under the Commerce Clause.[10]

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[10] Indeed, rather than holding that user fees are subject to more relaxed Commerce Clause review, as the court below stated, this Court has subjected such fees to more searching review in one respect—"[b]ecause such charges are purportedly assessed to reimburse the State for costs incurred in providing specific quantifiable services, [the Court] ha[s] required a showing, based on factual evidence in the record, that 'the fees charged do not appear to be manifestly disproportionate to the services rendered.'" *Commonwealth*

2. Had it applied the proper test, the Oregon Supreme Court would have invalidated the Oregon fee on the ground that the discriminatory exaction clearly violates the Commerce Clause's anti-discrimination principle.

The Oregon regulation, and the underlying statutory provisions, are constitutionally indistinguishable from the Alabama tax held unconstitutional by this Court in *Chemical Waste Management*. The Alabama law imposed a disposal tax only on interstate waste disposed of within the State. This Court held that Alabama bore the burden of justifying the discriminatory tax " 'both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.' " 112 S. Ct. at 2014 (citation omitted).

Alabama could not carry that burden. The Court found that Alabama failed to show that the tax on interstate waste was justified by higher costs or environmental risks associated with the disposal of that waste. Because these factors did not vary with the origin of the waste, but were the same for each ton of waste regardless of origin, the State could not single out interstate waste for a higher tax burden. 112 S. Ct. at 2014-2016. Less discriminatory alternatives were available, "not the least of which [is] a generally applicable per-ton additional fee on *all* hazardous waste disposed of within Alabama." *Id.* at 2015 (emphasis in original).

Edison, 453 U.S. at 622 n.12 (citation omitted). The burden imposed upon taxpayers by general revenue taxes is subject to much less searching judicial scrutiny. *Id.* at 625-629.

The Oregon regulation suffers from the same flaw. Interstate waste alone is targeted for an additional exaction, but—as was the case with the Alabama statute—neither the Oregon law nor the regulation links that additional burden to any unique characteristic of interstate waste, such as a higher per-ton cost to the State as compared to Oregon waste. Rather, the statute's very terms establish that the categories of costs that the State seeks to recover through the fee are the kinds of costs that result from the disposal of all types of waste. See Or. Rev. Stat. § 459.298 (1991) (referring to costs incurred for solid waste management, issuing permits for disposal sites, environmental and ground water monitoring, and site closure activities).

Thus, each ton of interstate waste is assessed a fee calculated to reimburse the State for the entire cost of regulating disposal of that waste, but intrastate waste is exempt from that burden and instead is assessed a fee representing a significantly smaller share of the State's costs. (The additional fee applicable to Oregon waste is only 36% of the amount applicable to interstate waste. See pages 6-7, *supra*.) The regulation subjects interstate commerce to a burden from which intrastate commerce is exempt: compensating the State for *all* of the costs associated with waste disposal.

As with the Alabama tax, such blatant discrimination violates the Commerce Clause. The face of the statute makes clear that the purpose of the fee is to recover the costs associated with regulating waste disposal. Yet Oregon has not pointed to any reason why it cannot recover all of its costs of regulation through a nondiscriminatory per-ton fee on all waste disposed of within the State. (Indeed, Oregon already

uses nondiscriminatory fees to recover a wide variety of costs associated with its regulation of waste disposal. See pages 4-5, *supra*.)[11] Because there plainly are less discriminatory means by which Oregon may accomplish its purpose, the fee on interstate waste violates the Commerce Clause.

C. The Question Presented Has Considerable Practical Significance.

The implications of the Oregon Supreme Court's "user fee exception" are staggering. The airport tax at issue in *Evansville* would have been constitutional even if it were levied *only* on interstate passengers. A State that required, for example, inspection of meat and produce before it could be sold could impose the full cost of inspection on out-of-state goods while levying no fee at all for performing the same inspections of in-state products.

[11] The state court of appeals speculated (App., *infra*, 43a) that the discriminatory fee might be justified on the ground that the State regulates the generators of Oregon waste but does not regulate generators of interstate waste. But Oregon law requires that all waste satisfy the same standards in order to be disposed of in Oregon landfills. See, *e.g.*, Or. Rev. Stat. § 459.305 (1991) (permitting disposal of interstate waste only if it is the product of a regulatory regime requiring out-of-state generators to engage in the equivalent degree of waste reduction and recycling as Oregon generators).

Moreover, the discriminatory fee is calculated on the basis of *all* costs incurred by the State, not simply any increased costs that might result from any differences between interstate and Oregon waste. Because costs that are not unique to interstate waste are included in the fee, but intrastate waste is not required to bear those same costs, the fee plainly discriminates against interstate waste. For these reasons, it is not surprising that the state supreme court did not rely on the lower court's speculation; indeed, the supreme court did not even mention the point.

Creating such a significant difference in the Commerce Clause standards applicable to general taxes and user fees would almost certainly trigger a dramatic increase in the number and magnitude of discriminatory user fees. This Court has long recognized that States have an inherent incentive to shift costs to out-of-state taxpayers. See, *e.g.*, *Nippert* v. *City of Richmond*, 327 U.S. 416, 434-435 (1946) (in invalidating a discriminatory tax, the Court observed that "[p]rovincial interests and local political power are at their maximum weight in bringing about acceptance of this type of legislation"). Although the political process does provide a check against disproportionate *nondiscriminatory* fees, because such fees are borne by intrastate as well as interstate commerce, the political process provides little or no protection against disproportionate *discriminatory* fees because the parties burdened by such fees are not represented. *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33, 46 n.2 (1940) ("to the extent that the burden falls on economic interests without the state, it is not likely to be alleviated by those political restraints which are normally exerted on legislation where it affects adversely interests within the state"). States would rush to impose discriminatory user fees and to recharacterize as many levies as possible as fees for "costs" incurred by the State.

Indeed, States might well begin to impose user fees to recover potential costs, such as the costs associated with hazardous materials, but only with respect to interstate commerce in such materials. Alabama, for example, could reenact the $72 tax on disposal of out-of-state hazardous waste invalidated in *Chemical Waste Management* and attempt to defend the levy

as a user fee based on the State's actual and potential costs. The opportunities for economic protectionism disguised as cost recovery would be tremendous.

The truncated Commerce Clause standard formulated by the Oregon court would provide no real protection against these unjustified burdens. Courts would be able to invalidate a fee limited to interstate commerce only if the fee was manifestly disproportionate to the State's costs, a test that leaves considerable leeway for the imposition of heavy—and discriminatory—burdens on interstate commerce. This Court should grant the petition to make clear that there is no loophole for user fees in the anti-discrimination mandate of the Commerce Clause.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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July 14, 1993

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APPENDICES

APPENDIX A

FILED: April 15, 1993

IN THE SUPREME COURT
OF THE STATE OF OREGON

GILLIAM COUNTY, OREGON, and OREGON WASTE SYSTEMS, INC., PETITIONERS ON REVIEW

v.

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON, RESPONDENT ON REVIEW

COLUMBIA RESOURCE COMPANY, L.P., a Washington Limited Partnership, PETITIONER ON REVIEW

v.

ENVIRONMENTAL QUALITY COMMISSION, RESPONDENT ON REVIEW

(DEQ 45-1990; CA A68441 (Control), A68455)
(cases consolidated)
(SC S39659, S39658)

In Banc

On review from the Court of Appeals.*

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* Judicial review from the Department of Environmental Quality and the Environmental Quality Commission. 114 Or App 369, 837 P2d 965 (1992).

Argued and submitted March 4, 1993.

John DiLorenzo, of O'Connell, Goyak & DiLorenzo, Portland, argued the cause and filed the petition for petitioner on review Columbia Resource Company, L.P. With him on the petition was Michael E. Farnell.

J. Laurence Cable, of Cable, Huston, Benedict, Haagensen & Ferris, Portland, argued the cause for petitioner on review Oregon Waste Systems, Inc. James E. Benedict filed the petition for review. With Mr. Benedict on the petition was James M. Coleman, of O'Donnell, Ramis, Crew & Corrigan, Portland, who waived argument for petitioner on review Gilliam County, Oregon,

Robert M. Atkinson, Assistant Attorney General, Salem, argued the cause for respondents on review. With him on the response to the petition were Theodore R. Kulongoski, Attorney General, and Virginia L. Linder, Solicitor General, Salem.

GRABER, J.

The decision of the Court of Appeals is affirmed.

GRABER, J.

At issue in this case is the validity of regulations imposing a per-ton surcharge on the disposal in Oregon of solid waste generated outside the state. ORS 459.297(1) provides:

> "Beginning on January 1, 1991, every person who disposes of solid waste generated out-of-state in a disposal site or regional disposal site shall pay a surcharge as established by the Environmental Quality Commission under ORS 459.298. The surcharge shall be in addition to any other fee charged for disposal of solid waste at the site."

ORS 459.298 provides:

> "Subject to approval by the Joint Committee on Ways and Means during the legislative sessions or the Emergency Board during the interim between sessions, the Environmental Quality Commission shall establish by rule the amount of the surcharge to be collected under ORS 459.297. The amount of the surcharge shall be based on the costs to the State of Oregon and its political subdivisions of disposing of solid waste generated out-of-state which are not otherwise paid for under the provisions of [statutes relating to solid waste disposal, domestic solid waste disposal, and household hazardous waste disposal]. These costs may include but need not be limited to costs incurred for:
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> "(1) Solid waste management;
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> "(2) Issuing new and renewal permits for solid waste disposal sites;
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> "(3) Environmental monitoring;
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> "(4) Ground water monitoring; and
>
> "(5) Site closure and post-closure activities."

As authorized by ORS 459.297 and 459.298, the Environmental Quality Commission (EQC) promulgated rules pertaining to the disposal of solid waste. OAR 340-61-115(1) provides in part:

> "Beginning July 1, 1984, each person required to have a Solid Waste Disposal Permit shall be

subject to a three-part fee consisting of a filing fee, an application processing fee and an annual compliance determination fee as listed in OAR 340-61-120. In addition, each disposal site receiving domestic solid waste shall be subject to an annual recycling program implementation fee as listed in OAR 340-61-120, and a per-ton fee on domestic solid waste * * *. In addition, each disposal site or regional disposal site receiving waste generated out-of-state shall pay a surcharge * * *."

OAR 340-61-120(6) provides:

"Surcharge on disposal of waste generated out-of-state. Each solid waste disposal site or regional solid waste disposal site that receives solid waste generated out-of-state shall submit to the Department of Environmental Quality a per-ton surcharge of $2.25. This surcharge shall apply to each ton of out-of-state waste received at the disposal site[.]"

Petitioners Oregon Waste Systems, Inc., Columbia Resource Company, L.P., and Gilliam County, Oregon,[1] sought judicial review of OAR 340-61-115(1)

[1] The Court of Appeals explained petitioners' interest in the surcharge:

"Petitioner Oregon Waste Systems, Inc. (OWS), owns and operates a regional solid waste disposal facility known as the Columbia Ridge Recycling Center and Landfill. It is located southwest of Arlington in Gilliam County. OWS disposes of waste generated in Oregon and also waste generated outside of Oregon. The operation provides direct and indirect benefits to petitioner Gilliam County as a result of employment in the county and the payment of local fees and taxes.

"Petitioner Columbia Resource Company, L.P. (CRC), has a 20-year contract with Clark County, Washington, under which it disposes of solid waste originating there. CRC uses the Finley Buttes Landfill in Morrow County as its disposal site. The operator of the Finley Buttes Landfill passes through to CRC the costs incurred for disposal, including charges made by respondent Department of Environmental Quality (DEQ)."

Gilliam County v. Dept. of Environmental Quality, 114 Or App 369, 372, 837 P2d 965 (1992).

and 340-61-120(6) in the Court of Appeals pursuant to ORS 183.400.[2] Petitioners argue that, because

[2] ORS 183.400 provides in part:

"(1) The validity of any rule may be determined upon a petition by any person to the Court of Appeals in the manner provided for review of orders in contested cases. The court shall have jurisdiction to review the validity of the rule whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question, but not when the petitioner is a party to an order or a contested case in which the validity of the rule may be determined by a court.

"* * * * *

"(3) Judicial review of a rule shall be limited to an examination of:

"(a) The rule under review;

"(b) The statutory provisions authorizing the rule; and

"(c) Copies of all documents necessary to demonstrate compliance with applicable rulemaking procedures.

"(4) The court shall declare the rule invalid only if it finds that the rule:

"(a) Violates constitutional provisions;

ORS 459.298 requires approval of the amount of the surcharge by the Joint Ways and Means Committee or by the Emergency Board and because those approval provisions are not severable from the remainder of the statute, ORS 459.298 violates Article I, section 21;[3] Article III, sections 1[4] and 3;[5] Article IV, section 25;[6] and Article V, section 15b,[7] of the Oregon Constitution. As a result, they argue, the implementing regulations also are invalid. In the alternative, petitioners argue that, even if ORS 459.298, OAR 340-61-115(1), and OAR 340-61-120(6) are valid under the Oregon Constitution, they are invalid because they impermissibly discriminate against interstate commerce in violation of the Commerce Clause, Article I, section 8, clause 3,[8] of the Constitution of the United States.

Respondent Department of Environmental Quality (DEQ), the state agency for which EQC is the policy making body, concedes that, "to the extent [that

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"(b) Exceeds the statutory authority of the agency; or

"(c) Was adopted without compliance with applicable rulemaking procedures."

[3] Article I, section 21, of the Oregon Constitution, provides in part:

"[N]or shall any law be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution[.]"

[4] Article III, section 1, of the Oregon Constitution, provides:

"The powers of the Government shall be divided into three seperate (sic) departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided."

[5] Article III, section 3, of the Oregon Constitution, provides in part:

"(1) The Legislative Assembly is authorized to establish by law a joint committee composed of members of both houses of the Legislative Assembly, the membership to be as fixed by law, which committee may exercise, during the interim between sessions of the Legislative Assembly, such of the following powers as may be conferred upon it by law[.]"

The enumerated powers include the power, in an emergency, to allocate funds to state agencies, to authorize state agencies to expend funds already allocated but in excess of agency budgets, and to revise or amend the budgets of state agencies; and the power to approve, or revise and approve, budgets for new activities. *Id.* at § 3(1)(a) to (d).

[6] Article IV, section 25, of the Oregon Constitution, provides:

"A majority of all the members elected to each House shall be necessary to pass every bill, or Joint resolution; and all bills, and Joint resolutions so passed, shall be signed by the presiding officers of the respective houses."

[7] Article V, section 15b, of the Oregon Constitution, provides in part:

"(1) Every bill which shall have passed the Legislative Assembly shall, before it becomes a law, be presented to the Governor; if the Governor approve, the Governor shall sign it; but if not, the Governor shall return it with written objections to that house in which it shall have originated[.]"

[8] Article I, section 8, clause 3, of the Constitution of the United States, provides:

"The Congress shall have Power * * * To regulate Commerce * * * among the several States[.]"

ORS 459.298] subjects DEQ's surcharge determination to Emergency Board approval," that statute is unconstitutional under Article III, sections 1 and 2,[9] and Article IV, section 25, of the Oregon Constitution. DEQ argues, however, that that portion of the statute is severable and that the remainder of the statute and its accompanying regulations are valid under the Oregon Constitution and under the Commerce Clause, Article I, section 8, clause 3, of the Constitution of the United States.

The Court of Appeals accepted DEQ's concession as to the unconstitutionality of the portion of ORS 459.298 relating to approval of the surcharge by the Emergency Board, concluding that that portion violates Article III, section 3, of the Oregon Constitution. *Gilliam County v. Dept. of Environmental Quality*, 114 Or App 369, 375-76, 837 P2d 965 (1992). The Court of Appeals concluded that the portion of ORS 459.298 relating to approval of the surcharge by the Joint Committee on Ways and Means also is unconstitutional, because it violates Article IV, section 25, of the Oregon Constitution. *Id.* at 379-80. The court held, however, that those portions of the statute are severable and that "the language that remains after both approval provisions are deleted is still a workable statute that contains clear standards for EQC to follow." *Id.* at 378, 382-383. Next, the Court of Appeals held that OAR 340-61-115(1)

[9] Article III, section 2, of the Oregon Constitution, provides:

> "The Legislative Assembly shall have power to establish an agency to exercise budgetary control over all executive and administrative * * * agencies of the State Government."

and 340-61-120(6) do not violate the Commerce Clause, because the surcharge imposed on out-of-state waste is a permissible "compensatory fee for specific costs incurred by the state" in the disposal of that waste and because, under the scope of review granted to the court by ORS 183.400, the court could not say that the amount of that fee either impermissibly exceeds those state costs or is insufficiently related to the services provided by the state in relation to disposal of out-of-state waste. *Id.* at 383-88. We affirm the decision of the Court of Appeals.

We begin by considering petitioners' state law claims. *See State v. Kennedy*, 295 Or 260, 262, 666 P2d 1316 (1983) (court decides questions of state law before reaching federal constitutional issues). Further, "[t]his court follows the principle that constitutional issues should not be decided when there is an adequate statutory basis for a decision." *Planned Parenthood Assn. v. Dept. of Human Resources*, 297 Or 562, 564, 687 P2d 785 (1984).

In a challenge to a regulation under ORS 183.400(4), this court first decides whether the regulation was promulgated according to applicable rulemaking procedures. ORS 183.400(4)(c). We then decide whether the promulgation of the regulation was within the jurisdictional authority of the promulgating agency and whether the substance of the regulation neither departed from the legal standard expressed or implied in the enabling statute, nor contravened any other applicable statute. ORS 183.400(4)(b). Only after determining that the regulation meets those requirements do we consider the question whether the regulation violates any provision of the Oregon or United States Constitution.

ORS 183.400(4)(a). *See Planned Parenthood Assn. v. Dept. Of Human Resources, supra*, 297 Or at 565 (setting forth that three-part analysis).

First, petitioners make no contention that the challenged regulations were "adopted without compliance with applicable rulemaking procedures," namely, the rulemaking procedures established by ORS 459.298. ORS 183.400(4)(c).

Next, as petitioners concede, EQC had jurisdictional authority to promulgate OAR 340-61-115(1) and 340-61-120(6). Petitioners do not contend that those regulations depart from the legal standards expressed or implied in the authorizing statute, ORS 459.298.

Petitioners contend, however, that, because the regulations include the cost of out-of-state waste reduction certification as a component of the surcharge, they contravene ORS 459.305. We disagree. ORS 459.305(1) provides that disposal sites may not accept waste generated outside the county in which the site is located unless DEQ certifies that the latter area has implemented a recycling program. ORS 459.305(4) permits DEQ to establish, according to the rulemaking procedures provided in ORS 468.065, a certification fee in relation to that requirement. Nothing in ORS 459.305 or 468.065 prohibits DEQ from including the cost to the state of certifying out-of-state waste reduction programs as a component of the surcharge authorized under ORS 459.298.

For the above reasons, we conclude that OAR 340-61-115(1) and 340-61-120(6) are not invalid under ORS 183.400(4)(b) in any of the particulars urged by petitioners.

We thus reach the question whether OAR 340-61-115(1) and 340-61-120(6) violate any provisions of the Oregon or United States Constitutions, ORS 183.400(4)(a), and turn to petitioners' state constitutional claim. We begin by asking whether, as petitioners allege, the statute in accordance with which those regulations were promulgated is itself impermissible in relation to any provision of the Oregon Constitution. *See* ORS 183.400(3)(b) (judicial review of rule includes examination of statutory provisions authorizing the rule).

As did the Court of Appeals, we conclude that ORS 459.298 is unconstitutional in two respects. First, as respondent concedes, ORS 459.298 is constitutionally impermissible insofar as it requires approval of EQC's rules by the Emergency Board. Second, the statute is constitutionally impermissible insofar as it requires approval of EQC's rules by the Joint Committee on Ways and Means. As written, ORS 459.298 requires either the Emergency Board (in the interim between legislative sessions) or the Joint Committee on Ways and Means (during sessions of the Legislative Assembly) to approve the rules before they can become legally effective. That requirement gives the Emergency Board or the Joint Committee on Ways and Means the right to veto the rules. But, a veto is a legislative act, and a legislative act by less than a majority vote of each chamber is unconstitutional. *See* Or Const, Art III, § 3, set out in part at note 5, *supra* (authorizing establishment of Emergency Board with certain enumerated powers, not including the power to approve or disapprove the rules at issue in this case); Or Const, Art IV, § 25, set out in part at note 6, *supra* (legislation must be passed by a majority of all members of each

house of the Legislative Assembly and signed by the presiding officers of the respective houses); Or Const, Art V, § 15b, set out in part at note 7, *supra* (legislative enactments must be presented to Governor and either signed by her or returned to legislature with written objections). *See also INS v. Chadha*, 462 US 919, 103 S Ct 2764, 77 L Ed 2d 317 (1983) (a provision of the Immigration and Nationality Act that authorized *either* house of Congress, by resolution, to veto a decision of the Executive Branch to allow a deportable alien to remain in the United States was unconstitutional; citing Article I, sections 1 and 7, of the Constitution of the United States, the Court held that the challenged provision violated the principle of separation of powers and allowed a legislative veto by less than a vote of each chamber).

Nevertheless, the statute as a whole need not be invalidated if the portions that have been found constitutionally impermissible are severable from the remainder. The severability of unconstitutional portions of a statute is governed by ORS 174.040, which provides:

> "It shall be considered that it is the legislative intent, in the enactment of any statute, that if any part of the statute is held unconstitutional, the remaining parts shall remain in force unless:
>
> "(1) The statute provides otherwise;
>
> "(2) The remaining parts are so essentially and inseparably connected with and dependent upon the unconstitutional part that it is apparent that the remaining parts would not have been enacted without the unconstitutional part; or

> "(3) The remaining parts, standing alone, are incomplete and incapable of being executed in accordance with the legislative intent."

Nothing in the text of ORS 459.298 provides that, if any part of that statute were held to be unconstitutional, the remaining parts should not remain in force. *See* ORS 174.040(1), *supra*.

Neither are the portions of ORS 459.298 relating to the establishment of the surcharge by EQC and to the bases of that surcharge "so essentially and inseparably connected with and dependent upon" the approval portions of the statute that it is apparent, either from the text or from the legislative history of the statute, that the former parts would not have been enacted without the latter. *See* ORS 174.040(2), *supra*. ORS 459.298 is part of a comprehensive statutory scheme of regulating solid waste, which includes many sections authorizing public bodies to impose fees to recover their costs.[10] The overriding

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[10] Those include: ORS 459.053(9) (DEQ—fees to repay department costs and fund operation and maintenance of a department-owned landfill disposal site); ORS 459.125(1)(d) (Marion County—fees to control and regulate disposal, transfer, and resource recovery sites located in the county); *former* ORS 459.170(1)(g) (renumbered 459A.025 in 1991) (EQC—fees to carry out various provisions of the chapter); *former* ORS 459.200(7)(b) (renumbered 459A.085 in 1991) (cities and counties—fees from persons holding collection service franchises); ORS 459.235 (fee for permit to operate a disposal site); ORS 459.236 (permit fees imposed on all disposal sites to pay for removal or remediation of hazardous substances); ORS 459.284 (permit fees that are imposed on governmental unit that has a disposal site to be used for rehabilitation and enhancement of the area around the site); *former* ORS 459.294 (renumbered 459A.110 and amended by Or Laws 1991, ch 385, § 91) and *former* ORS 459.295 (renumbered 459A.120 in 1991) (EQC—schedule of fees for

purpose of ORS 459.298, as revealed by its text and context, is to permit the establishment and collection of fees.

We also note, as did the Court of Appeals, the pertinent legislative history. The committee that considered HB 3515, which became Oregon Laws 1989, chapter 833, and which included the challenged provision, was told that "the Emergency Board does not have the approval authority[,] * * * it is a review and comment only." The committee instructed its staff to use "the toughest language we can have for E-Board control over the fee," but the legislature did not add a nonseverability provision. Tape Recording, Ways and Means Committee Subcommittee on Transportation and Regulation, June 24, 1989, Tape 155, Side B.

The legislature's permissible choice was between having no surcharge on the disposal of solid waste generated out of state and having a surcharge established by EQC without a veto by the Emergency Board or Joint Committee on Ways and Means. As between the two, we believe that the legislature intended to have a surcharge.

Finally, ORS 459.298 is neither incomplete, nor incapable of being executed, in the absence of the ap-

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receipt of domestic solid waste; to be used to reduce environmental risks at waste disposal sites); ORS 459.305(4) (fee for certification that a governmental unit has implemented recycling opportunity provisions); ORS 459.310 (local governments can impose surcharge on solid waste received at regional disposal sites); ORS 459.311 (local governments must charge for remedial action or removal at solid waste disposal site); ORS 459.335 (user fees set by metropolitan service district); and ORS 459.509 to 459.765 (fees for sale of new tires and disposal of waste tires).

proval portions of the statute. *See* ORS 174.040(3), *supra.*

The portions of ORS 459.298 relating to approval of the surcharge by the Emergency Board or the Joint Committee on Ways and Means, being unconstitutional and severable, are deleted from the statute. The remaining portions of the statute shall continue in force.

Petitioners have made no other challenges under the Oregon Constitution to OAR 340-61-115(1) and 340-61-120(6), beyond those already discussed. We turn, therefore, to petitioners' claim that ORS 459.298, OAR 340-61-115(1), and OAR 340-61-120(6) impermissibly discriminate against interstate commerce in violation of Article I, section 8, clause 3, of the Constitution of the United States. For the following reasons, we conclude that they do not.

The Commerce Clause grants to Congress the power to regulate commercial transactions among the states, subject to the specific guarantees of the Constitution of the United States. By that grant of power to Congress, the Commerce Clause implicitly "limits the power of the States to discriminate against interstate commerce." *Wyoming v. Oklahoma*, —— US ——, 112 S Ct 789, 800, 117 L Ed 2d 1 (1992); *see also New Energy Co. of Indiana v. Limbach*, 486 US 269, 273, 108 S Ct 1803, 100 L Ed 2d 302 (1988) (stating that principle). As the Supreme Court of the United States has explained, "[t]his 'negative' aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. of Indiana v. Limbach, supra*, 486 US at 273-74.

Consistent with that proscription, states may not enact laws that discriminate against articles of commerce [11] coming from outside the state unless there is some reason, apart from their origin, for treating those articles differently. *City of Philadelphia v. New Jersey*, 437 US 617, 626-27, 98 S Ct 2531, 57 L Ed 2d 475 (1978). *Cf. Chemical Waste Management v. Hunt*, —— US ——, 112 S Ct 2009, 2013-15, 119 L Ed 2d 121 (1992) (where the only discernible basis for an additional fee imposed on out-of-state waste was the origin of the waste, "invalidity under the Commerce Clause necessarily follows"). The burden is on the state to show that a differential charge "'is demonstrably justified by a valid factor unrelated to economic protectionism.'" *Id.* at 2015 (quoting *Wyoming v. Oklahoma*, *supra*, 112 S Ct at 801). *See Fort Gratiot Landfill v. Mich. Dept. of Nat. Res.*, —— US ——, 112 S Ct 2019, 119 L Ed 2d 139 (1992) (holding invalid on Commerce Clause grounds a Michigan statute prohibiting landfills from accepting solid waste generated outside the county in which the landfill was located, unless the acceptance of such waste was explicitly authorized by the receiving county; after rejecting the state's argument that the restriction was justified on the ground that it treated waste from other Michigan counties no differently than waste from other states, and its argument that the statute constituted a "comprehensive health and safety regulation rather than 'economic protectionism,'" the Court concluded that the state failed to advance "any legitimate reason for allowing [landfills] to accept waste from inside the county but not waste from outside the county").

[11] "Solid waste, even if it has no value, is an article of commerce" for Commerce Clause purposes. *Fort Gratiot Landfill v. Mich. Dept. of Nat. Res.*, —— US ——, 112 S Ct 2019, 2023, 119 L Ed 2d 139 (1992); *see also Chemical Waste Management v. Hunt*, —— US ——, 112 S Ct 2009, 2012 n 3, 119 L Ed 2d 121 (1992) (same); *City of Philadelphia v. New Jersey*, 437 US 617, 622-23, 98 S Ct 2531, 57 L Ed 2d 475 (1978) (same).

We apply those principles to the statutes and regulations at issue here. ORS 459.297 requires EQC to promulgate regulations establishing a surcharge on the disposal of out-of-state solid waste. ORS 459.298 requires EQC to base the amount of that surcharge on the "costs to the State of Oregon and its political subdivisions of disposing of solid waste generated out-of-state which are not otherwise paid for" under other waste disposal programs, including costs arising from permit issuance, management, monitoring, and closure activities at disposal sites accepting out-of-state waste. On their face, OAR 340-61-115(1) and 340-61-120(6) purport to comply with those statutory mandates.

Because of the express nexus to actual costs incurred, we conclude that the surcharge authorized by ORS 459.297 and 459.298, and established by OAR 340-61-115(1) and 340-61-120(6), does not, on its face, constitute discrimination against an article of commerce, the origin of which is outside the state. There is a discernible basis for the surcharge apart from that origin. *See City of Philadelphia v. New Jersey*, *supra*, 437 US at 626-27 (establishing that test). Through the statutory and regulatory criteria, the state has met its burden of showing that the surcharge "is demonstrably justified by a valid factor unrelated to economic protectionism." *Chemical Waste Management v. Hunt*, *supra*, 112 S Ct at 2015.

We further conclude that, rather than being a constitutionally impermissible burden on out-of-state economic interests, *New Energy Co. of Indiana v. Limbach*, *supra*, the surcharge imposed on out-of-state waste by ORS 459.298 and its implementing regulations constitutes a "compensatory" fee for specific costs incurred by the state in the regulation of that waste. *See Commonwealth Edison v. Montana*, 453 US 609, 621-22, 622 n 12, 101 S Ct 2946, 69 L Ed 2d 884 (1981) (describing such fees). A law imposing a compensatory fee for costs incurred by a state in supervising and regulating the activities of an entity engaged in interstate commerce is *prima facie* reasonable. *Great Northern Ry. Co. v. Washington*, 300 US 154, 160, 57 S Ct 397, 81 L Ed 573 (1937). Such a law violates the Commerce Clause only where the amount of the fee is "manifestly disproportionate to the services rendered." *Clark v. Paul Gray, Inc.*, 306 US 583, 599, 59 S Ct 744, 83 L Ed 1001 (1939). *See Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc.*, 405 US 707, 92 S Ct 1349, 31 L Ed 2d 620 (1972) (fees reflecting a fair approximation of the use of facilities and not excessive in relation to costs incurred do not violate the Commerce Clause); *Ingles v. Morf*, 300 US 290, 294, 57 S Ct 439, 81 L Ed 653 (1936) (a fee burdening interstate commerce may be justified by showing that it constitutes "reimbursement for the expense of providing facilities, or of enforcing regulations of the commerce").

Petitioners contend that, even assuming that *some* fee could be imposed without offending the Commerce Clause, the present fees do offend the Commerce Clause, because they are "disproportionate." Such a claim cannot be adjudicated in the present proceed-

ing. Our scope of review under ORS 183.400 precludes us from deciding whether the surcharge is impermissible as "disproportionate" to the services rendered or to the costs incurred by the State of Oregon in connection with permitting waste disposal sites to accept solid waste generated out of state, because those are factual inquiries. As this court noted in *AFSCME Local 2623 v. Dept. of Corrections*, 315 Or 74, 79, 843 P2d 409 (1992), "judicial review under ORS 183.400 is limited to the face of the rule and the law pertinent to it. Numerous individual fact situations can arise under any rule, but judicial review of the rule as applied to each of those situations is reserved to other forums." Similarly, petitioners' claim of disproportionality may not be addressed in this proceeding under ORS 183.400.

The decision of the Court of Appeals is affirmed.

APPENDIX B

FILED: July 22, 1992

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

GILLIAM COUNTY, OREGON and
OREGON WASTE SYSTEMS, INC., PETITIONERS

v.

DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF OREGON, RESPONDENT

COLUMBIA RESOURCE COMPANY L.P.,
a Washington Limited Partnership, PETITIONER

v.

ENVIRONMENTAL QUALITY COMMISSION, RESPONDENT

(CA A68441 (Control) & CA A68455)
(Cases Consolidated)

Judicial Review of Administrative Rules.

Argued and submitted September 6, 1991.

J. Laurence Cable, Portland, argued the cause for petitioners Gilliam County, Oregon, and Oregon Waste Systems, Inc. With him on the brief were

James E. Benedict, Donald A. Haagensen, Hill, Huston, Cable, Ferris & Haagensen, Timothy V. Ramis, Jeff Bachrach, and O'Donnell, Ramis, Crew & Corrigan, Portland.

John A. DiLorenzo, Jr., Portland, argued the cause for petitioner Columbia Resource Company, L.P. With him on the brief was O'Connell, Goyak & DiLorenzo, Portland.

Robert M. Atkinson, Assistant Attorney General, Salem, argued the cause for respondents. With him on the brief were Dave Frohnmayer, Attorney General, and Virginia L. Linder, Solicitor General, Salem.

Before Buttler, Presiding Judge, and Rossman and De Muniz, Judges.

DE MUNIZ, J.

Rules held valid.

DE MUNIZ, J.

Petitioner Oregon Waste Systems, Inc. (OWS), owns and operates a regional solid waste disposal facility known as the Columbia Ridge Recycling Center and Landfill. It is located southwest of Arlington in Gilliam County. OWS disposes of waste generated in Oregon and also waste generated outside of Oregon. The operation provides direct and indirect benefits to petitioner Gilliam County as a result of employment in the county and the payment of local fees and taxes.

Petitioner Columbia Resource Company, L.P. (CRC), has a 20-year contract with Clark County, Washington, under which it disposes of solid waste

originating there. CRC uses the Finley Buttes Landfill in Morrow County as its disposal site. The operator of the Finley Buttes Landfill passes through to CRC the costs incurred for disposal, including charges made by respondent Department of Environmental Quality (DEQ).

Petitioners challenge the constitutionality of two DEQ rules that the Environmental Quality Commission (EQC) adopted in December, 1990, OAR 340-61-115(1); OAR 340-61-120(6), and the enabling statutes that established the legal standards and procedures for adoption of those rules. ORS 459.297; ORS 459.298. The portions of the rules that petitioners challenge impose a surcharge for in-state disposal of garbage generated out-of-state.[1]

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[1] Pertinent parts of the rules provide:

"Beginning July 1, 1984, each person required to have a Solid Waste Disposal Permit shall be subject to a three-part fee consisting of a filing fee, an application processing fee and an annual compliance determination fee as listed in OAR 340-61-120. In addition, each disposal site receiving domestic solid waste shall be subject to an annual recycling program implementation fee as listed in OAR 340-61-120, and a per-ton fee on domestic solid waste as specified in section (5) of this rule. In addition, each disposal site or regional disposal site receiving solid waste generated out-of-state shall pay a surcharge as specified in section (6) of this rule." OAR 340-61-115 (1).

"Each solid waste disposal site or regional solid waste disposal site that receives solid waste generated out-of-state shall submit to the Department of Environmental Quality a per-ton surcharge of $2.25. This surcharge shall apply to each ton of out-of-state solid waste received at the disposal site." OAR 340-61-120(6).

In 1989, the legislature enacted Oregon Laws 1989, chapter 833, an amalgamation of several bills dealing with waste reduction. Section 155, codified as ORS 459.297, provides that every person who disposes of solid waste that was generated out-of-state must pay a surcharge to help meet the cost to the state of administering the solid waste program.[2] Section 156, codified as ORS 459.298, enables EQC to establish the amount of the surcharge.[3] The rules

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[2] ORS 459.297 provides:

"(1) Beginning on January 1, 1991, every person who disposes of solid waste generated out-of-state in a disposal site or regional disposal site shall pay a surcharge as established by the Environmental Quality Commission under ORS 459.298. The surcharge shall be in addition to any other fee charged for disposal of solid waste at the site.

"(2) The surcharge collected under this section shall be deposited in the State Treasury to the credit of an account of the Department of Environmental Quality. Such moneys are continuously appropriated to the department to meet the costs of the department in administering the solid waste program under ORS 459.005 to 459.426, 459.705 to 459.790 and 459A.005 to 459A.665."

[3] ORS 459.298 provides:

"Subject to approval by the Joint Committee on Ways and Means during the legislative sessions or the Emergency Board during the interim between sessions, the Environmental Quality Commission shall establish by rule the amount of the surcharge to be collected under ORS 459.297. The amount of the surcharge shall be based on the costs to the State of Oregon and its political subdivisions of disposing of solid waste generated out-of-state which are not otherwise paid for under the provisions of ORS 459.235 and ORS 459.297, 459.298, 459.411 to 459.417, 459A.100 to 459A.120 and sections 70

impose on the disposal site a surcharge of $2.25 per ton for out-of-state waste that the site receives. The surcharge imposed at the disposal site for waste generated within Oregon is capped at $.50 per ton. *Former* ORS 459.294(5).[4]

The Oregon Supreme Court has explained that, before we can reach constitutional issues under ORS 183.400,[5] we must first determine: (1) whether the agency had the general authority to make that kind of rule; (2) whether the agency followed the procedures prescribed by statute or regulation; and (3) whether the substance of the rule departed from the legal standard expressed or implied in the enabling legislation or contravened some other applicable statute. *Planned Parenthood Assn. v. Dept. of Human Res.*, 297 Or 562, 565, 687 P2d 785 (1984).

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to 73, chapter 833, Oregon Laws 1989. These costs may include but need not be limited to costs incurred for:

"(1) Solid waste management;

"(2) Issuing new and renewal permits for solid waste disposal sites;

"(3) Environmental monitoring;

"(4) Ground water monitoring; and

"(5) Site closure and post-closure activities."

[4] ORS 459.294 was renumbered ORS 459A.110 in 1991. Or Laws 1991, ch 385, § 91.

[5] ORS 183.400(4) provides:

"The court shall declare the rule invalid only if it finds that the rule:

"(a) Violates constitutional provisions;

"(b) Exceeds the statutory authority of the agency; or

"(c) Was adopted without compliance with applicable rulemaking procedures."

"These steps are designed to assure that the challenged action, particularly an action challenged for arguably violating constitutional rights, in fact was authorized by the state's or local government's politically accountable policy makers. Only if the action was clearly so authorized is there any reason to decide whether the state or local government has adopted a policy that the constitution forbids." 297 Or at 565.

Petitioners do not contend that the agency did not have the general authority to make rules imposing surcharges on solid waste. They also make no meritorious arguments that the substance of the rules deviated from the legal standard provided in the statute [6] or that they contravened some other applicable statute.[7] Their procedural argument is that ORS

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[6] Gilliam County argues that the agency improperly considered various costs to include as components of the surcharge. It cites *Kids Against the Cut v. Wage and Hour Comm.*, 41 Or App 179, 597 P2d 1264 (1979), for the proposition that we must examine DEQ's "methodology to develop" those costs to determine whether the agency "failed to act in conformance with the enabling statute." That infers too much from *Kids Against the Cut*. In that case, we held only that we may look at the record to see whether the agency made a determination on which its authority to act was predicated, not that we may consider whether the method used to reach that determination was correct.

[7] Petitioners assert in one short paragraph that EQC violated ORS 459.305 by including in the surcharge $0.05 per ton for what EQC calls "solid waste reduction activities related to reviewing and certifying out-of-state waste reduction and recycling plans." They argue that certification fees may not be "lumped into the surcharge levied on all out of state waste," because they must be "set in accordance with ORS

459.298 requires the agency to follow a process that violates the Oregon Constitution and that the statute in its entirety is therefore invalid, so no rules could be made under it. They argue in the alternative that, if the procedures are permissible, then the rules are

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486.065," which they believe requires the fee to be set by a rule after a hearing. Moreover, they observe, the fee is "subject to review of the Executive Department and the prior approval of the appropriate legislative review agency." ORS 459.305(4).

Even assuming, without deciding, that ORS 459.305 is the exclusive source of authority for EQC to assess the certification fee, we see nothing in the statute that prohibits the agency from considering that fee at the same time that it considers the surcharge and nothing that requires the fee to be established by a separate rule, rather than as a component part of a more general rule. We also see nothing in ORS 468.065 (*since amended by* Or Laws 1991, ch 752, § 15) that requires the certification fee to be set by a rule after a hearing. Subsection (1) pertains only to permits issued under various sections of ORS chapters 448, 454 and 468. Subsection (2) pertains only to fees for permits issued pursuant to the specified sections that govern water and air pollution sources. Subsection (3) describes the costs that the agency may consider in determining fees for certification of hydroelectric power projects. Subsection (5) applies only to the specified sections of chapters 448, 454 and 468. Subsections (4) and (6) are the only subsections to which ORS 459.305 (4) *could* refer. The former provides that DEQ may require various documents and reports to be submitted by those who apply for permits; the latter merely addresses what must be done with the fees that the DEQ collects. Neither requires a separate rule or a hearing.

We also see no merit in petitioners' second argument under ORS 459.305(4). As far as we can tell, that subsection requires nothing different from the procedure specified under ORS 459.298. Petitioners do not explain any other way that we should read it, and we decline to try to create an argument for them.

invalid, because the agency did not follow those procedures. If the rules were made by a valid procedure, they argue, they are nonetheless invalid, because they impermissibly discriminate against interstate commerce in violation of the United States Constitution.

We turn first to the state law issues. *Planned Parenthood Assn. v. Dept. of Human Res., supra.* Under ORS 459.298, the amount of the surcharge is subject to approval by the Joint Committee on Ways and Means (Committee) during legislative sessions or by the Emergency Board during the interim. OWS argues that the grant of authority to the Emergency Board violates the state constitution. CRC agrees and argues that subjecting the rules to approval by the Committee is also unconstitutional. Both petitioners assert that the unconstitutional provisions render the statute unconstitutional and, therefore, that the rules promulgated under it are invalid. If the approval requirements are valid, they argue, then the rules are invalid, because EQC did not seek to obtain final approval from either authority.

Respondents concede, and we agree, that ORS 459.298 is unconstitutional to the extent that it subjects the surcharge determination to Emergency Board approval, because the Board has only the powers granted to it in Article III, section 3, of the Oregon Constitution. Art IV, §§ 1, 25. Those powers do not include the power to veto EQC's surcharge rule.[8]

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[8] No one has raised, and we do not decide, any issue about the validity of a statutory requirement that EQC *consult* the Emergency Board, any legislative committee or legislative counsel.

Respondents argue, however, that the language requiring Emergency Board approval is severable from ORS 459.298, that the statute is workable without that provision and that EQC followed the correct procedure by not obtaining final approval of the Board.

The starting point for deciding that issue is ORS 174.040, which states the legislative preference for severability:

> "It shall be considered that it is the legislative intent, in the enactment of any statute, that if any part of the statute is held unconstitutional, the remaining parts shall remain in force unless:
>
> "(1) The statute provides otherwise;
>
> "(2) The remaining parts are so essentially and inseparably connected with and dependent upon the unconstitutional part that it is apparent that the remaining parts would not have been enacted without the unconstitutional part; or
>
> "(3) The remaining parts, standing alone, are incomplete and incapable of being executed in accordance with the legislative intent."

Petitioners contend that Emergency Board approval is essential to the remaining parts, because without it the statute cannot be executed in accordance with legislative intent.

The bills that comprised HB 3515, which became Oregon Laws 1989, chapter 833, had been referred first to subject matter committees to consider their substance and then to the Joint Committee on Ways and Means to consider their fiscal impacts. The Joint Committee on Ways and Means, the first committee

to consider HB 3515 as a whole, inserted the Emergency Board approval requirement without providing a detailed explanation for it. Petitioners rely on the history of other sections of the bill that also included Emergency Board oversight. On the basis of that history, they argue that "the overriding philosophy * * * was to maintain strict E-Board control over fees of various agencies" and that the legislature would not have enacted the statute without that control.

The history cited by petitioners shows that members of the Committee were informed that, legally, the Emergency Board could review and comment on the surcharges, but that it did not have approval authority. During consideration of the State Fire Marshall's authority to establish a fee schedule relating to hazardous wastes,[9] a legislative committee staff member, Acuff, commented:

> "Mr. Chairman, I believe that legislative counsel will tell you that the Emergency Board does not have the approval authority * * * that it is a review and comment only."

The response of the chair, Representative Hanlon, was to instruct staff to include control "to the extent authorized by law."

The history also demonstrates that inclusion of Emergency Board review was intended to permit the exertion of political, even if not legal, pressure:

> "Acuff: "Well, I think you're accomplishing your objective * * *. I think you're accomplish-

[9] The quotations are from Tape Recording, Ways and Means Subcommittee on Transportation and Regulation regarding HB 3515, June 24, 1989, 155B.

ing the objective that you want now in limiting the dollars that you have in your first four decisions. You're forcing the fee structure as it is and they will come back to you and prove that [to] you either to the E-Board or to the Assembly.

"Rep. Jones: Except that * * * if [the Fire Marshall does not prove the need to the Emergency Board to increase fees] they go ahead and do it anyway.

"Acuff: I doubt that the Fire Marshall would go ahead and do it anyway.

"Rep Hanlon: So do I. We will be breaking for a quick lunch at 12:30 * * * half an hour or so. Up to the lounge and get some cornflakes. I would like to see the amendment. I'm not sure because I wasn't listening to the whole thing, but I think Representative Jones and I agree the amendment should be made to the fullest extent possible to control the imposition of those fees. And that means that the E-Board * * * whoever it is that's approving it in the legislature has the authority * * * that authority * * * whatever authority they have, they may, may exercise at that point.

"Sen. Hill: Mr. Chairman.

"Rep. Hanlon: Larry.

"Sen. Hill: I'd agree. I'd ask that the committee request Sue to give us the toughest language we can have for E-Board control over the fee."

We infer from that discussion that the legislature wanted to exercise whatever authority it could over

the imposition of fees but that it understood that the Emergency Board might not have the power to overrule the agency. Nevertheless, it did not enact a nonseverability provision, as it presumably would have done had it intended to override the preference for severability contained in ORS 174.040.

With the unconstitutional provision granting approval authority to the Emergency Board omitted, the statute provides:

> "Subject to approval by the Joint Committee on Ways and Means during the legislative sessions, the Environmental Quality Commission shall establish by rule the amount of the surcharge to be collected under ORS 459.297."

The statute, so read, is restrictive in that it limits the approval requirement to when the legislature is in session. That does not render the statute unworkable. We conclude that the unconstitutional provision relating to Emergency Board authority is severable.

Read that way, however, the statute still requires EQC to submit the surcharge rules to the Committee for approval. CRC argues that that provision also violates the Oregon Constitution. It urges us to adopt the reasoning of *INS v. Chadha*, 462 US 919, 103 S Ct 2764, 77 L Ed 2d 317 (1983), which held unconstitutional a provision of the Immigration and Nationality Act of 1952, 8 USC §§ 1101 *et seq*, that purportedly authorized a one-house legislative veto of the Attorney General's determination that a particular deportable alien should not be deported. 8 USC § 1254(c)(2). Respondents do not directly respond to those arguments but, in the course of explaining that the Emergency Board provision is severable, they conclude that "without the offending

provision the statute simply provides that the agency shall set the rates." We assume, however, that respondents did not intend that to be an affirmative concession that the provision subjecting the rules to the approval of the Committee is also unconstitutional.

CRC argues that, even if approval of the surcharge is a legislative act,[10] the Committee cannot do it, because all bills must be approved by a majority of each house, Or Const, Art IV, § 25, and presented to the governor for signature. Or Const, Art V, § 15b.[11] The plain language of the statute provides that the rules are subject to approval of the *Committee*; it does not provide that the rules are subject to approval of the Legislative Assembly. The legislature has required approval of the Emergency Board or the "Legislative Assembly" before agency action can take

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[10] Respondents concede that, if approval of the surcharge rule is an executive act, then only the Executive Branch may approve. Or Const, Art III, § 1. They also do not argue that any part of the legislature could approve the surcharge, if approval is a judicial act.

[11] Article IV, section 25, provides:

> "A majority of all the members elected to each House shall be necessary to pass every bill, or Joint resolution; and all bills, and Joint resolutions so passed, shall be signed by the presiding officers of the respective houses."

Article V, section 15b(1), provides:

> "Every bill which shall have passed the Legislative Assembly shall, before it becomes a law, be presented to the Governor; if the Governor approve, the Governor shall sign it; but if not, the Governor shall return it with written objections to that house in which it shall have originated, which house shall enter the objections at large upon the journal and proceed to reconsider it."

effect in other contexts, but it did not use such language here. *See, e.g.*, ORS 341.565(4); ORS 537.805(4)(a).[12] Although the legislature has the undoubted authority to enact laws establishing charges, nowhere does the legislative history suggest that anyone thought that the provision required any action by the Legislative Assembly beyond review by the Committee. We therefore read the words "Joint Committee on Ways and Means" to signify that the legislature intended the approval process to be completed by the Committee without further legislative process.

If the statute were given effect as written, it would constitute a command by the legislature ordering EQC to propose legislation to be enacted by the Committee. Respondents concede that the power to enact or repeal laws is vested solely in the Legislative Assembly and that power cannot be delegated, even to a group of its own members. *See Marr v. Fisher et al.*, 182 Or 383, 388, 187 P2d 966 (1947); *Van Winkle v. Fred Meyer, Inc.*, 151 Or 455, 49 P2d

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[12] We note that several other 1989 enabling statutes that contained language requiring Committee or Emergency Board approval were amended in 1991. Those statutes now contain language similar to that in ORS 448.410(1)(d), which governs the adoption of fees to certify persons qualified to supervise the operation of sewage treatment works:

> "Subject to the prior approval of the Executive Department and a report to the Emergency Board prior to adopting the fee, * * *. The fees established * * * shall be within the budget authorized by the Legislative Assembly as that budget may be modified by the Emergency Board."

See also ORS 448.450(1)(d); ORS 453.408(3); ORS 465.385(2)(b).

1140 (1935); *see also* 31 Op Att'y Gen 161 (Or 1962-64). The Committee is composed of only 16 legislators, 8 from each house, ORS 171.555, and therefore could not constitute "[a] majority of all the members elected to each House." Or Const, Art IV, § 25. No laws can constitutionally be enacted by the process described in the statute.[13]

CRC argues that the approval provision is not severable from the statute for all the same reasons that Emergency Board approval is not severable. The starting point again is ORS 174.040. Because the legislature has expressed a strong general preference in favor of severability, we can find the Committee approval requirement not severable only if (1) it is apparent that the legislature would not have enacted the statute without that provision or (2) the resulting parts of the statute would be incomplete and incapable of being executed in accordance with legislative intent.

ORS chapter 459 contains over 40 pages devoted to the control of solid waste. The legislature found that "[t]here is a shortage of appropriate sites for landfills in Oregon," ORS 459.015(1)(c), and:

> "It is in the best interests of the people of Oregon to extend the useful life of existing solid waste disposal sites by encouraging recycling and reuse of materials whenever recycling its economically feasible, and by requiring solid

[13] We also note that, even if we were to construe the language to imply that the Committee would submit EQC's proposal to the Legislative Assembly, the statute would still establish a defective process, because all bills must originate in one of the houses and revenue bills must originate in the House of Representatives. Or Const, Art IV, § 18.

> waste to undergo volume reduction through recycling and reuse measures *before disposal in landfills* to the maximum extent feasible. Implementation of recycling and reuse measures will not only increase the useful life of solid waste disposal sites, but also decrease the potential public health and safety impacts associated with landfill operation." ORS 459.015(1)(d) (*since amended by* Or Laws 1991, ch 385, § 7). (Emphasis supplied.)

The legislative scheme was intended to establish a comprehensive system of regulation that provides for broad participation and cooperation among local governments and state agencies, "reserving to the state those functions necessary to assure effective programs, cooperation among local government units and coordination of solid waste management programs throughout the state." ORS 459.015(2)(c) (*since amended by* Or Laws 1991, ch 385, § 7). It delegated to EQC and DEQ the authority to adopt and enforce rules in order to implement and assure the effectiveness of the extensive regulatory plan. *See* ORS 459.025; ORS 459.045; ORS 459.376; ORS 459.385.

Chapter 459 contains a plethora of sections authorizing EQC, DEQ and local governments to impose fees and charges to recover costs at each step in the solid waste control program.[14] As in the stat-

[14] Those include: ORS 459.053(9) (DEQ—fees to repay department costs and fund operation and maintenance of a department owned landfill disposal site); ORS 459.125(1)(d) (Marion County—fees to control and regulate disposal, transfer and resource recovery sites located in the county); *former* ORS 459.170(1)(g) (renumbered 459A.025 in 1991) (EQC—fees to carry out various provisions of the chapter); *former*

utes at issue here, almost every delegation of authority to charge a fee is accompanied by an explanation of how the fee is to be calculated and how the funds collected are to be used. *See, e.g., former* ORS 459.170(2) (renumbered 459A.025(2) in 1991); *former* ORS 459.200(8) (renumbered 459A.085 in 1991); ORS 459.235(2); ORS 459.236(5); ORS 459.284; ORS 459.335. That careful structuring of fees demonstrates that the legislature wanted to ensure that the costs of each protective activity would be borne by those who had created the need for it. It clearly wished to avoid spreading among all Oregonians the costs of mitigating environmental risks that they did not create.

Although the Committee was reluctant to delegate final authority to EQC to establish the surcharge,

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ORS 459.200(7)(b) (renumbered 459A.085 in 1991) (cities and counties—fees from persons holding collection services franchises); ORS 459.235 (fee for permit to operate a disposal site); ORS 459.236 (permit fees imposed on all disposal sites to pay for removal or remediation of hazardous substances); ORS 459.284 (permit fees that are imposed on governmental unit that has a disposal site to be used for rehabilitation and enhancement of the area around the site); *former* ORS 459.294 (renumbered 495A.110 and amended by Or Laws 1991, ch 385, § 91) and *former* ORS 459.295 (renumbered 459A.120 in 1991) (EQC—schedule of fees for receipt of domestic solid waste; to be used to reduce environmental risks at waste disposal sites); ORS 459.305(4) (fee for certification that a governmental unit has implemented recycling opportunity provisions); ORS 459.310 (local governments can impose surcharge on solid waste received at regional disposal sites); ORS 459.311 (local governments must charge for remedial action or removal at solid waste disposal site); ORS 459.335 (user fees set by metropolitan service district); and ORS 459.509-ORS 459.765 (fees for sale of new tires and disposal of waste tires).

that reluctance was insufficient to motivate it to include in the statute a non-severability clause. *See, e.g., INS v. Chadha, supra*, 462 US at 932. From that fact, the extensiveness of the regulatory scheme, the detail with which the authority was delegated and the nature of the overall fee structure that the chapter creates, we conclude that the legislature would have enacted ORS 459.297 and ORS 459.298 even if it had known that neither the Committee nor the Emergency Board could have the power to veto the resulting rules.[15] The language that remains after both approval provisions are deleted is still a workable statute that contains clear standards for EQC to follow.

After EQC drafted the rule that established the fee, it submitted it to the Emergency Board. The Board instructed EQC that the fee had been set too high for reasons that we need not examine. EQC then redrafted the rule to require a slightly lower fee. It did not, however, submit the amended rule to the Emergency Board or to the Committee for final approval. Strictly speaking, EQC did not follow the procedure prescribed in the statute. The rule is not invalid on that ground, however, because the portion of the statutory procedure that the agency failed to follow is unconstitutional. It would be perverse, indeed, to hold a rule invalid on the ground that the agency did not follow a constitutionally impermissible

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[15] Even without the power to veto administrative rules, the legislature retains oversight by virtue of ORS 171.572, which provides:

> "The Legislative Counsel shall review administrative rules adopted or proposed for adoption by state agencies. Such review shall be in accordance with the provisions of ORS 183.710 to 183.725."

procedure. No one has otherwise challenged the validity of the procedure that EQC actually employed.

Petitioners contend that OAR 340-61-115(1) and OAR 340-61-120(6) violate the Commerce Clause, Article I, section 8, clause 3, of the United States Constitution [16] by imposing a higher surcharge for garbage received from out-of-state haulers than that received from in-state haulers.[17]

The Commerce Clause grants Congress the power to regulate commerce among the states. Unless Congress precludes it, states may make laws that affect persons engaged in interstate commerce. However, states cannot enact laws that discriminate against articles of interstate commerce "unless there is some reason, apart from their origin, to treat them differently." *City of Philadelphia v. New Jersey*, 437 US

[16] Article I, section 8, clause 3, of the United States Constitution provides:

"The Congress shall have Power * * *
"* * * * *

"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

[17] The rules require Oregon landfill operators to remit the surcharge to DEQ, but do not require them to exact the surcharge from out-of-state haulers. Accordingly, a landfill operator can pass the surcharge on to in-state as well as out-of-state haulers in the form of uniformly increased dumping fees. Nevertheless, because it is interstate commerce that gives rise to the obligation to pay the surcharge, the rules are subject to scrutiny under the Commerce Clause. *See Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Nat'l Res.*, —— US ——, 112 S Ct 2019, —— L Ed 2d —— (1992); *Evansville Airport v. Delta Airlines*, 405 US 707, 714, 92 S Ct 1349, 31 L Ed 2d 620 (1972); *Pickard v. Pullman Southern Car Co.*, 117 US 34, 6 S Ct 635, 29 L Ed 785 (1886).

617, 627, 98 S Ct 2531, 57 L Ed 2d 475 (1978); *see also Chemical Waste Management, Inc. v. Hunt*, —— US ——, 112 S Ct 2009, —— L Ed 2d —— (1992); *Fort Gratiot Sanitary Landfill, Inc., v. Michigan Dept. Nat'l Res., supra*, n 17; *New Energy Co. of Indiana v. Limbach*, 486 US 269, 273, 108 S Ct 1803, 100 L Ed 2d 302 (1988). States cannot benefit in-state interests by burdending out-of-state interests. *New Energy Co. of Indiana v. Limbach, supra*, 486 US at 273; *see also Wyoming v. Oklahoma*, —— US ——, 112 S Ct 789, 800, 117 L Ed 2d 1 (1992).

The rules at issue here, by the express language of ORS 459.298, exact a compensatory fee for specific costs incurred by the state. They exact a per-ton surcharge on landfill operators who accept refuse from out-of-state haulers. ORS 459.297 provides that those funds are appropriated to DEQ to meet the costs that it incurs in administering the solid waste program. ORS 459.298 provides that the amount of the surcharge must be based on the costs to the state and its political subdivisions of disposing of solid waste generated out-of-state. Those may include, but are not limited to, costs associated with solid waste management, permit issuance, environmental monitoring, ground water monitoring and site closure. They may not include costs that are paid under other provisions in the chapter. The rules implement those statutory directives.

Laws that impose compensatory fees [18] are

[18] A compensatory fee is not the same thing as a "compensatory tax," which is a general revenue measure that is intended to equalize the tax burden between substantially similar interstate and intrastate transactions. The classic example is a use tax imposed on goods purchased out of state

> "not a burden upon, or regulation of, interstate commerce in violation of the commerce clause of the Constitution. A law exhibiting the intent to impose a compensatory fee for such a legitimate purpose is prima facie reasonable." *Great Northern Ry. Co. v. State of Washington*, 300 US 154, 160, 57 S Ct 397, 81 L Ed 573 (1937). (Footnotes omitted.)

See also Commonwealth Edison Co. v. Montana, 453 US 609, 622 n 12, 101 S Ct 2946, 69 L Ed 2d 884 (1981). When that kind of law is challenged on Commerce Clause grounds, the challenger has the burden to show that the fee is excessive for the purpose for which it is collected, *Clark v. Paul Gray, Inc.*, 306 US 583, 599, 59 S Ct 744, 83 L Ed 1001 (1939), or that "there is no sufficient relation between the measure employed and the extent or manner of use" of the state provided service. *Interstate Transit, Inc. v. Lindsey*, 283 US 183, 190, 51 S Ct 380, 75 L Ed 953 (1931).[19]

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that is equivalent to the sales tax that would have been generated had those goods been purchased in state. *See Henneford v. Silas Mason Co.*, 300 US 577, 57 S Ct 524, 81 L Ed 814 (1937). Such taxes permit an individual faced with the choice of an in-state or out-of-state purchase to make that choice without regard to the tax consequences. *Boston Stock Exchange v. State Tax Comm'n*, 429 US 318, 330, 97 S Ct 599, 50 L Ed 2d 514 (1977). Accordingly, when a state enacts a valid compensatory tax, it does not discriminate against interstate commerce. *Complete Auto Transit, Inc. v. Brady*, 430 US 274, 97 S Ct 1076, 51 L Ed 2d 326 (1977); *see also Maryland v. Louisiana*, 451 US 725, 759-60, 101 S Ct 2114, 68 L Ed 2d 576 (1981).

[19] Petitioners argue that we should apply the reasoning in a number of cases that address discriminatory health and general welfare laws and general revenue measures. Regula-

In *Interstate Busses Corp. v. Blodgett*, 276 US 245, 48 S Ct 230, 72 L Ed 551 (1928), a state law had assessed a per-mile user fee on busses engaged in interstate commerce but did not assess that fee on those engaged in intrastate commerce. The Court first recognized that a state may impose a reasonable

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tions that control conduct to protect some aspect of the health or general welfare of a state's citizens are valid when preservation of health or welfare is the law's true purpose and the means chosen to achieve that objective does not unduly burden interstate commerce. *Maine v. Taylor*, 477 US 131, 106 S Ct 2440, 91 L Ed 2d 110 (1986); *Pike v. Bruce Church, Inc.*, 397 US 137, 142, 90 S Ct 844, 25 L Ed 174 (1970). However, if the actual purpose or effect of a health or welfare regulation is economic or resource protectionism, the law may be invalid. *See, e.g., Wyoming v. Oklahoma, supra*; *Hunt v. Washington State Apple Advertising Comm.*, 432 US 333, 97 S Ct 2434, 53 L Ed 2d 383 (1977); *Dean Milk Co. v. City of Madison*, 340 US 349, 71 S Ct 295, 95 L Ed 329 (1951); *compare Maine v. Taylor, supra*, with *City of Philadelphia v. New Jersey, supra*. General revenue measures are taxes imposed to compensate the state for "providing police and fire protection, the benefit of a trained work force, and the advantages of a civilized society." *Commonwealth Edison Co. v. Montana, supra*, 453 US at 624. (Citations and internal quotations omitted.) A state can impose such a tax on those engaged in interstate commerce if it

> "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services provided by the State." *Complete Auto Transit, Inc. v. Brady, supra*, 430 US at 274.

When a law satisfies that standard, out-of-state interests pay their fair share of the costs of running the state.

The statutes and rules here neither regulate conduct nor impose taxes that support state government generally. The fees are based on and applied to the provision of a narrow range of state services that are directly connected to the activity on which the fees are imposed.

charge for the use of the facilities that it provides to those engaged in interstate commerce, roads, in that case. It then determined, from a facial review of the statutory scheme, that the funds generated were dedicated to financing those facilities. The Court sustained the validity of the fee, because the party challenging it failed to show that "the aggregate charge [bore] no reasonable relation to the privilege granted." 276 US at 252.

In *Clark v. Paul Gray, Inc., supra*, the state had exacted a "caravaning" fee for each automobile "operated on its own wheels, or in tow of a motor vehicle, for the purpose of selling or offering the same for sale * * * within or without [the] State." 306 US at 586. (Citation omitted.) The purpose of the fee was

> "to reimburse the State for expense [*sic*] incurred in administering police regulations pertaining to the operation of vehicles moved pursuant to such permits and to public safety upon the highways as affected by such operation." 306 US at 586. (Citation omitted.)

Because the law exempted cars moved exclusively within one of two zones that were roughly defined as the northern and southern halves of the state, the plaintiffs claimed that it unlawfully discriminated against interstate commerce. The Court disagreed. It first determined that the distinction that the state had made between intrazone and interzone traffic was permissible, because the state incurred a distinct burden by managing and facilitating the latter form of traffic and the intrazone traffic was already paying its fair share of costs of that commerce. The Court then recognized that the fees would offend the Commerce Clause if the plaintiffs showed that they were "excessive for the declared purposes." 306 US at 599. Because the fees did not appear, on their face, to be manifestly disproportionate to the services rendered, and the plaintiffs failed to present any other evidence of disproportionality, the Court sustained the validity of the fees. EQC's rules exact a compensatory fee for the distinct burden that the state incurs to regulate and facilitate disposal of out-of-state waste. Unlike the Michigan plan at issue in *Chemical Waste Management, Inc. v. Hunt, supra*, the rules impose a surcharge on in-state *and* out-of-state waste for the state services. The state might nevertheless be unlawfully discriminating if there is no reason, apart from its origin, to charge more for its services to manage and regulate out-of-state waste than it charges to manage and regulate in-state waste. The state, however, appears to have a reason apart from origin *per se* to treat out-of-state waste differently. It first encounters any out-of-state waste at the disposal site. In contrast, by the time in-state reaches the disposal site, it has already been subjected to state and local regulations and fees that are designed to reduce its volume and alter its character in order to limit the risks associated with dumping it on the ground. *See* n 14, *supra*. We cannot discern, from a facial review of the rules and legislation whether, in the aggregate, in-state garbage ultimately "pays" all of the costs that the state and its political subdivisions incur to manage and regulate its disposal. However, it does show that EQC is expressly forbidden to impose fees on out-of-state waste that exceed the costs of management of that waste. The legislature has made abundantly clear that it intends only to make "out-of-state generators pay their 'fair share' of the costs" and no

more. *Chemical Waste Management, Inc. v. Hunt, supra,* —— US at —— n 9. Therefore, before we could say that the rules are unconstitutional, petitioners would have to show that the fees are excessive for the purposes for which they are collected or that there is no sufficient relation between the measure employed and the extent or manner of use of the state provided service.

Petitioners brought this challenge under ORS 183.-400, which provides, in part:

> "(3) Judicial review of a rule shall be limited to an examination of:
>
> "(a) The rule under review;
>
> ("b) The statutory provisions authorizing the rule; and
>
> "(c) Copies of all documents necessary to demonstrate compliance with applicable rule-making procedures."

A facial review of the enabling legislation and the rules does not show that the fees are either excessive or unrelated to the state provided service. ORS 183.-400(3) does not permit us to consider the evidence that petitioners would have to produce to show that the fees are, nevertheless, manifestly disproportionate to the costs incurred by the state to manage and facilitate disposal of out-of-state waste. That kind of evidence can be considered only on review of an order in a contested case. ORS 183.482.

Rules held valid.

APPENDIX C

FILED: April 15, 1993

IN THE SUPREME COURT
OF THE STATE OF OREGON

GILLIAM COUNTY, OREGON, and OREGON WASTE SYSTEMS, INC., PETITIONERS ON REVIEW

v.

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON, RESPONDENT ON REVIEW

COLUMBIA RESOURCE COMPANY, L.P., a Washington Limited Partnership, PETITIONER ON REVIEW

v.

ENVIRONMENTAL QUALITY COMMISSION,
RESPONDENT ON REVIEW

(DEQ 45-1990; CA A68441 (Control), A68455)
(cases consolidated)
(SC S39659, S39658)

APPELLATE JUDGMENT

In Banc

On review from the Court of Appeals.*

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* Judicial review from the Department of Environmental Quality and the Environmental Quality Commission. 114 Or App 369, 837 P2d 965 (1992).

John DiLorenzo, Portland, attorney for petitioner on review Columbia Resource Company, L.P., J. Laurence Cable, and James E. Benedict Portland, attorneys for petitioner on review Oregon Waste Systems, Inc., James M. Coleman, Portland, waived argument for petitioner on review Gilliam County, Oregon,

Robert M. Atkinson, Assistant Attorney General, Salem, attorney for respondents on review.

GRABER, J.

The decision of the Court of Appeals is affirmed. Rules held valid.

Appellate Judgment SUPREME COURT

Effective Date: June 9, 1993 (seal)

APPENDIX D

Sections 459.297 and 459.298 of the Oregon Revised Statutes (1991) provide in pertinent part:

459.297 Surcharge on solid waste generated out-of-state. (1) Beginning on January 1, 1991, every person who disposes of solid waste generated out-of-state in a disposal site or regional disposal site shall pay a surcharge as established by the Environmental Quality Commission under ORS 459.298. The surcharge shall be in addition to any other fee charged for disposal of solid waste at the site.

(2) The surcharge collected under this section shall be deposited in the State Treasury to the credit of an account of the Department of Environmental Quality. Such moneys are continuously appropriated to the department to meet the costs of the department in administering the solid waste program under ORS 459.005 to 459.-426, 459.705 to 459.790 and 459A.005 to 459A.-665.

458.298 Amount of surcharge on solid waste generated out-of-state. Subject to approval by the Joint Committee on Ways and Means during the legislative sessions or the Emergency Board during the interim between sessions, the Environmental Quality Commission shall establish by rule the amount of the surcharge to be collected under ORS 459.297. The amount of the surcharge shall be based on the costs to the State of Oregon and its political subdivisions of disposing of solid waste generated out-of-state which are not otherwise paid for under the provisions

of ORS 459.235 and 459.297, 459.298, 459.411 to 459.417, 459A.100 to 459A.120 and sections 70 to 73, chapter 833, Oregon Laws 1989. These costs may include but need not be limited to costs incurred for:

(1) Solid waste management;

(2) Issuing new and renewal permits for solid waste disposal sites;

(3) Environmental monitoring;

(4) Ground water monitoring; and

(5) Site closure and post-closure activities.

Oregon Administrative Rule 340-97-110 (formerly 340-61-115) provides in pertinent part:

(3) Out-of-state solid waste. In addition, each disposal site or regional disposal site receiving solid waste generated out-of-state shall pay a per-ton solid waste disposal fee as specified in Section 6 of OAR 340-97-120 or a surcharge as specified in Section 7 of OAR 340-97-120.

Oregon Administrative Rule 340-97-120 (formerly 340-61-120) provides in pertinent part:

(7) Surcharge on disposal of solid waste generated out-of-state. Each solid waste disposal site or regional solid waste disposal site that receives solid waste generated out-of-state shall submit to the Department of Environmental Quality a per-ton surcharge of $2.25. This surcharge shall apply to each ton of out-of-state solid waste received at the disposal site.

(a) This per-ton surcharge shall apply to all solid waste received after January 1, 1991.

(b) Submittal schedule: This per-ton surcharge shall be submitted to the Department quarterly, or on the same schedule as the waste volume reports required in the disposal permit, whichever is less frequent. Quarterly remittals shall be due on the 30th day of the month following the end of the calendar quarter.

(c) This surcharge shall be in addition to any other fee charged for disposal of solid waste at the site.